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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1492

S. T. G. CONSTRUCTION CO., INC.,
Petitioner,

against

THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONER

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The issue on which petitioner seeks certiorari is established by respondent's statement that, although the specifications set up a "recommended procedure" for excavation within the cells and blasting, the contract did not *require* this method (Resp's Br. p. 5).

The fact is that the specifications did not merely recommend a construction procedure, but specified the construction method with which the contractor was required to strictly adhere (1003a).

The issue fairly stated was whether petitioner properly believed it was to follow the specified construction method prepared by respondent's architects-engineers. If so, peti-

tioner could rely on respondent's implied warranty that satisfactory performance would result. *U. S.* v. *Spearin*, 248 U. S. 132 (1918). Indeed, even if it was only a recommended procedure, the contractor would be entitled to rely on its efficacy. *Green* v. *City of New York*, 283 App. Div. 485 (1st Dep't, 1954).

Respondent states that, as the Trial Court found, there were three construction methods by which the cells could have been driven into rock "under the original plans and specifications" (Resp's Br. 9, top). Certainly none of these methods was specified. Respondent's architects-engineers, who specified definite, impracticable work procedures, and failed to redesign them when requested, only advanced these three construction methods at trial some seven years later.

Respondent argues that they did not have to be since customarily "construction methods are not set forth in specifications" (Resp's Br. 9-10). This is, inherently, a concession that they were not specified.

Here then is the simple, basic fallacy of respondent's entire case: how can they argue that construction methods are not set forth in specifications, and, therefore, not set forth in these specifications, when these specifications so plainly set them forth? Section IV, Art. 5 is entitled "CONSTRUCTION METHODS" and states that the cells shall be driven into rock, the earth in the interior of the cell excavated and that the rock shall then be excavated by an approved method, preferably in the dry, by conforming to procedures set forth in Section II, the section covering rock excavation procedures (1033a, 1034a).

Section II, Art. 4 sets forth the "METHODS AND PROTECTION" for excavating the 10 foot trench into the rock, specifically requiring blasting beneath the in-place tips of the sheet piles, enumerating precautions to be taken in blasting, and requiring the contractor to submit a plan setting forth blasting procedures (1003a).

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Thus, respondent interprets the specifications as providing no construction methods, placing on the contractor the responsibility of finding a method to achieve the result of sinking the sheet pile into rock. Petitioner, on the other hand, relies on the wording of the specifications, which expressly sets forth a definite construction method, and requires the contractor to perform strictly in accordance with such specifications. Respondent seeks to avoid the inconsistency between its position that specifications do not set forth construction methods, and the obvious fact that this specification does, by claiming that the specified method was only a recommended procedure for which respondent assumed no responsibility.

Despite its argument that specifications are not supposed to set forth construction methods, respondent thereafter admits that there are contract plans and specifications "which do not permit the contractor to depart from them in any respect" (Resp's Br. 12). This is only partially true. Detailed specifications may place certain responsibilities on the contractor, within the framework of the specified design (See Petition 18-20). In our case, the contractor was obligated to come up with a blasting plan consistent with specified procedures.

Respondent then distinguishes our contract from such a detailed specification by stating, without any basis therefor in the contract, that it permitted "the contractor to use any approved method of construction to achieve the end result" (Resp's Br. 12-13). To do this, respondent twists the language of the specifications requiring that blasting within the cell "preferably be done in the dry" (Section 4, Art. 5, 1034a)—an undisputed reference that the water filling the cell after excavation should, if possible, be pumped out before blasting, rather than to have divers blast under water (412a, 415a-417a, 458a, 443a-444a)—claiming this permitted the contractor to use any "wet" method. Respondent then simply argues that any other method would be a "wet" method, and, therefore encompassed under the specifications.

Of course, the only relevant issue is whether the respondent was responsible for the method expressly specified in the contract. If so, the feasibility of any other methods suggested by respondent is irrelevant, as well as being suspect by the fact that they were not timely suggested, and the further fact that the work was eventually performed by an entirely different design, which eliminated the requirement to sink the sheet piles into rock.

One of the methods, designated as a "wet" method by respondent was the "glory-hole" design, whereby the entire area of earth over-burden would be excavated before constructing the cell. This was diametrically contrary to the specifications requirement that each cell be first formed by driving the sheet piles and then excavated only within its circumference leaving the earth outside to support it. However, simply by calling it a "wet" method, respondent urges that it complied with the plans and specifications (Resp's Br. 9).

Respondent also claims that the method of pre-drilling through 35 feet of earth overburden into the rock so as to effect the ten foot trench in the rock, even before driving the piles and excavating within the cell, was a "wet" method. That method is actually the very antithesis of a "wet" method, since the rock would be excavated before the earth was removed, thus eliminating the flow of water into the excavated cell before rock excavation which would occur under the contractually specified method.

The Court of Appeals was confused into believing that the fender cells were to be installed in an existing water area, rather than, as conceded, in an existing land area. Consequently, its decision refers to drilling, "under water" to bedrock (Petition, 5a), whereas, such drilling was actually to be through 35 feet of earth overburden directly into underlying rock. Further, proof of this basic misconception by the Court of Appeals is that, in listing the work procedures as specified, it overlooked the whole excavation

operation, stating that the cells where to be driven to bedrock and then drained of water (Petition, 4a).

Respondent improperly argues that petitioner by eventually recommending a pre-drilling method, thereby admitted that the pre-drilling operation was encompassed by the specified design. The undisputed testimony was that petitioner only recommended a form of pre-drilling after it had ascertained that the designed procedures were dangerous and unworkable, and after respondent's representatives had approved such method and requested petitioner to present it as a *substitute* plan. (363a-367a, 534a-543a)

The concept of excavating the rock by pre-drilling was clearly contrary to the specified procedure in that it required the rock to be excavated, by drilling, not blasting, before rather than after the driving of the sheet piles and the excavation of the cells, thus elementary specified dewatering operations. Since it is the complete reverse of the specified method of procedure, pre-drilling cannot be said to have been intended under the contract.

Respondent's argument that petitioner was incompetent in utilizing the pre-drilling operations is belied by the fact that petitioner used the reputable firm of Spencer, White and Prentis, respondent's own completing contractor, which was only able to drive one and one-half unaligned holes with a 16-inch drill through the 35 feet of overburden. (181a-183a, 385a-386a, 556a-557a)

The third, unspecified method, utilizing a double cofferdam, is discused at page 13 of the petition.

The Petitioner's Failure to Blast

Respondent's brief does not dispute the fact that all the experts involved stated that blasting under the specified procedures would be dangerous and impracticable. (Petition, 5-6) Consequently, respondent's reference to "the phantom danger of blasting", and its insistence that peti-

tioner "never attempted to use any blasting procedures" (Resp's Br. 6-10) is unsupported verbiage, and meaningless. Such undisputed testimony that a dangerous "blow" would result if the work was performed expressly as designed, is the basis for petitioner's statements that the specified procedures were concededly faulty.

The Federal Question Involved

Petitioner requests certiorari on the basis that a specification so plainly detailing the method of procedure constitutes an implied warranty that such specified method will work. In view of the decisions of this Court in *U. S.* v. *Spearin, supra,* as well the many similar decisions of the Court of Claims in actions involving federal public works, and the government's direct interest in this case by reason of its agreement to pay 82½% of the cost under application of the Truman-Hobbs Act (which required competitive bidding), we submit that a basic question of federal law is involved.

Respondent's attempts to distinguish *U. S.* v. *Spearin* on the ground that there the contractor did follow plans and specifications, "whereas, S.T.G. did not attempt to construct the fender system *in accordance with the plans and specifications provided*"—an interesting admission in itself. (Resp's Br. 15, emphasis supplied) Respondent's argument that petitioner would have had to undertake and fail in an admittedly dangerous and impracticable operation in order that *Spearin* apply is patently ridiculous. (See Petition, 24-25.)

Respondent, not being able to distinguish *J. D. Hedin Construction* v. *U. S.*, 171 Ct. Cls. 70, 347 F. 2d 235 (1965) and *J. L. Simmons Co., Inc.*, 67-1 B.C.A. 29,417, dismisses them with the gratuitous statement that, unlike our case, they obviously involved a "design specification" (Resp's Br. 18). The specification in those cases imposed on the contractor even more responsibility and flexibility than petitioner had. Respondent's reference to the fact that

Dr. Rutledge was a witness for Simmons only points up the inconsistency of his testimony; there he claimed the contractor was given a detailed specification warranted by the owner; here, contrarily, he testified that construction methods are not set forth in specifications (612a).

Norfolk Dredging Co. v. *U. S.*, 175 Ct. Cls. 594, 360 F. 2d 619 (1966), the only case cited by respondent on the point, involved a unique situation wherein the government gave the contractor complete information showing that hydraulic fill to be poured in a tidal basin would be subject to locations where the bottom, being very soft and spongy, could cause the hydraulic fill to sink if poured in one spot. This necessitated pouring through a swinging pipe rather than a fixed pipe in order to spread the fill. The Court properly held that since the specifications provided that the contractor "shall" use "other devices" in addition to pipes under such circumstances, the contractor had been advised of, and had assumed responsibility to use, such devices where necessary to achieve the result. This, then was one of those novel situations where an end result was specified (Petition 17).

CONCLUSION

For the foregoing reason, it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

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